Supreme Court, U.S.
FILED
OCT 3 2000
CLERK

(3)

No. 00-361

In The

Supreme Court of the United States

MARGARET KELLY MICHAELS,

Petitioner,

v.

GEORGE McGRATH, RICHARD MASTROANGELO, SARA SENCER-McARDLE, LOUIS FONNELARAS, AND SUSAN ESQUILIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

TERRI SMITH
Counsel of Record

STEVENS & MINTER
One Harmon Plaza, 7th Floor
Secaucus, New Jersey 07094
(201) 319-5700

Counsel for Respondent Susan Esquilin, Ph.D. (improperly pleaded as "Susan Esquillan")

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup. Ct. Rule 29.6, respondent, Susan Esquilin, Ph.D. (improperly pleaded as "Susan Esquillan") states that she is a private individual with no affiliation to a corporation, parent company, or subsidiary.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
REASONS FOR DENYING THE WRIT	1
I. There Is No Inconsistency Among the Circuits with Regard to the Use of Improperly Obtained Statements of Third Parties in Criminal Prosecutions	2
II. Adequate Remedies Exist for the Protection and Redress of Wrongly Prosecuted Defendants	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994), *cert. den.*, 513 U.S. 1085 (1995) ..... *passim*

Clanton v. Cooper, 129 F.3d 1147 (10th Cir. 1997) 1, 5, 6, 7

Giuffre v. Bissell, 31 F.3d 1241 (3rd Cir. 1994) 8

Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) 2, 3, 6, 7

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) 6, 8

Schneider v. Simonini, 314 N.J. Super. 583 (App. Div. 1998) 7

State v. Michaels, 136 N.J. 299 (1994) 4, 6, 8

State v. Michaels, 264 N.J. Super. 579 (App. Div. 1993) 8

Thompson v. Prince William County, 753 F.2d 363 (4th Cir. 1985) 7

RULE

U.S. Sup. Ct. Rule 10 1

STATUTE

42 U.S.C.A. § 1983 ..... 2, 5, 6

REASONS FOR DENYING THE WRIT

Petitioner seeks review on a writ of certiorari on the grounds that the majority and the dissent in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. den.*, 513 U.S. 1085 (1995) disagree. This is not a traditional ground upon which a writ of certiorari may issue. U.S. Sup. Ct. Rule 10. The rule which sets forth commonly recognized grounds upon which a petition for a writ of certiorari may be granted limits those grounds to a situation in which "[one] United States court of appeals has entered a decision in conflict with the decision of *another* United States court of appeals on the same important matter." U.S. Sup. Ct. Rule 10. Petitioner cites no case or rule in which this Court has granted a writ of certiorari solely on the grounds that the case at bar relied upon a case in which a dissent was filed. Nor should such a result be permitted. There is no error in one Circuit Court agreeing with the majority decision of a sister Circuit.

Petitioner alternately seeks review on a writ of certiorari on the grounds that the Seventh Circuit decision in *Buckley, supra* is contrary to the Tenth Circuit decision in *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). Respondent maintains that these decisions are not in conflict but are reconcilable.

Petitioner additionally and alternately argues that, in the case at bar, the Third Circuit relied on erroneous facts to distinguish the *Clanton* decision. This argument is based upon a misreading of the Third Circuit's decision. In fact, the alleged factual distinction upon which petitioner relies was not determinative of the Third Circuit's analysis of *Clanton*.

Finally, petitioner seeks review on a writ of certiorari on the grounds that the decision of the Third Circuit leaves an entire class of criminal defendants without redress. This is an issue which this Court has already addressed. In *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984, 993 47 L.Ed.2d 128 (1976), this Court recognized that the balancing of competing rights and interests may, sometimes, "leave a genuinely wronged defendant without civil redress." Because criminal defendants have other means of redress, the absence of civil redress is not violative of any constitutional mandate.

I. There Is No Inconsistency Among the Circuits with Regard to the Use of Improperly Obtained Statements of Third Parties in Criminal Prosecutions.

The question of whether the improper interrogation of witnesses can be held to constitute a violation of the rights of the criminal suspect was addressed in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. den.*, 513 U.S. 1085 (1995). The *Buckley* Court held that the criminal suspect could not support a 42 U.S.C.A. § 1983 claim based upon an allegation of improper interrogation of witnesses because the constitutional violation, if any, was related to the rights of the witnesses, not the suspect.

> Coercing witnesses to speak, rather than loosening their tongues by promises of reward, is a genuine constitutional wrong, but the persons aggrieved would be [the witnesses] rather than [the suspect]. Overbearing tactics violate the right of the person being interrogated to be free from coercion.

Buckley, 20 F.3d at 794. Hence, even if the interrogation of the witnesses did exceed the bounds of propriety to the extent that a constitutional violation occurred, the party who suffered the wrong was the witness who had been subjected *to* the interrogation, not the party who was the subject *of* the interrogation.

If the fruits of the interrogation are used against the suspect either at trial or before the grand jury to obtain an indictment, all parties involved would be shielded by the absolute immunity from suit which attaches to the prosecutorial/advocacy aspect of their work as explained in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). However, if the fruits of the improper interrogation are not used, then there is no consequence to the suspect. Questions were asked about him but the answers were not used against him. The only injury which could possibly have occurred in the gathering of the information would have been to the witness who was interrogated. Therefore, unless and until the fruits of the interrogation are used in the prosecution of the suspect, his rights are not implicated. *See, Buckley*, 20 F.3d at 795.

Thus, while the witness might be able to sustain a § 1983 claim based upon the impropriety of the interrogation regardless of whether the fruits of the interrogation were presented in a prosecution, the suspect can never sustain a § 1983 claim based upon an improper interrogation of another person. "Rights personal to their holders may not be enforced by third parties." *Id.* The witnesses have the right to act to protect their own rights and seek remedial measures when those rights are violated. So, too, does the suspect have the right to protect her rights

and seek remedial measures when those rights are violated. However, the remedy is not always found in § 1983. The Third Circuit was persuaded by the Seventh Circuit's analysis and adopted the rule and rationale of the *Buckley* majority.

Petitioner seeks a different result by relying on the dissent in *Buckley*. However, the dissent relies upon a factual distinction which renders the reasoning inapplicable in the case at bar. The dissent in *Buckley* notes that "Buckley has alleged that the prosecutors fabricated evidence and induced perjured testimony which caused his imprisonment." *Buckley*, 20 F.3d at 801. The dissent defers to a liberal construction of the Complaint to reach the conclusion that the allegations must survive dismissal.

However, in the case at bar, while there are allegations of improper interrogation techniques,[1] nothing supports a conclusion that the evidence was deliberately fabricated or that perjury was suborned. The only allegation is that the techniques used resulted in evidence of dubious reliability. *State v. Michaels*, 136 N.J. 299, 324 (1994). The police were chided for "ineptness" but never accused of deliberate efforts to fabricate evidence or suborn perjury. *Michaels*, 136 N.J. at 313-14.

The Third Circuit reviewed, considered, and adopted the majority opinion in *Buckley*. Just as the petition for a writ of certiorari was denied in *Buckley*, so too, should it be denied in the case at bar. Petitioner's exhortation that

[1] Respondent Susan Esquilin, Ph.D. does not concede that her participation in the subject investigation was in any way or to any degree improper.

the *Buckley* dissent should be read to recognize a constitutional violation if petitioner can demonstrate that the indictment would not have occurred but for the wrongful conduct of the investigators fails to address the material factual distinction which formed the basis for Judge Fairchild's dissent. Because there is no evidence of suborned perjury in the case at bar, the present case is not an appropriate vehicle to raise the arguments of the *Buckley* dissent.

Petitioner also relies on *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997), a case which cites the majority opinion in *Buckley* with favor. *Clanton*, 129 F.3d at 1157-58. Indeed, although the *Clanton* Court held that a suspect had standing to contest the voluntariness of a witness' confession and that the suspect could sustain a § 1983 claim based upon a coerced confession unless qualified immunity attached, *Clanton* does not contradict the holding in *Buckley*. Rather, the cases are factually distinguishable and therefore reconcilable.

Like the *Buckley* Court, the *Clanton* Court held that the suspect could not sustain a claim under § 1983 until the tainted evidence was used against him:

> Consequently, because the evidence is unreliable and its use offends the Constitution, a person may challenge the government's *use* against him or her of a coerced confession given by another person.

Clanton, 1129 F.3d at 1157-58 (emphasis added). The facts – not the law – distinguish *Clanton* from *Buckley*.

Indeed, *Buckley* explained in *dicta* that the suspect had standing to challenge the **use** of the allegedly tainted

evidence at trial or before the grand jury but for the fact that these uses were cloaked in absolute immunity. Hence, while the use was subject to challenge, no remedy under a § 1983 suit was available as the suit would be barred. *Buckley*, 20 F.3d at 795. Standing was recognized in *Clanton* because the *use* of the challenged evidence was not subject to absolute immunity.

In *Clanton*, the allegedly tainted evidence was used by a Fire Marshall Agent to obtain an arrest warrant. The warrant was quashed and no charges were ever filed against the suspect. *Clanton*, 129 F.3d at 1150. The United States Supreme Court has held that a police officer applying for an arrest warrant is not shielded by absolute immunity but only protected by qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986). Hence, the § 1983 suit was not barred outright but subject to review under the standards of qualified immunity.

However, in the case at bar, the allegedly tainted evidence was used to obtain an indictment before a grand jury. *Michaels*, 136 N.J. at 305. Under *Buckley*, no claim for damages may be sustained under § 1983 based on this allegation because the evidence was used for a function from which all government actors are absolutely immune: presentation to a grand jury. *Imbler v. Pachtman*, 424 U.S. 409, 421-22, 96 S.Ct. 984, 991, 47 L.Ed.2d 128 (1976).

Petitioner's argument that the Third Circuit based its decision on erroneous facts is a misnomer. Petitioner argues that the Third Circuit erroneously found that the tainted statements were only used before the grand jury but that the Third Circuit should have found that the

statements were also used to fuel the investigation, an act which petitioner argues is not protected by immunity. No erroneous facts formed the basis of the Third Circuit's opinion.

This argument is based not upon a misunderstanding of facts but rather of Petitioner's disagreement with the Court's analysis of those facts. The decision of the Third Circuit fairly and fully explains the extent of the investigation and the evidence which led to the grand jury indictment. The Third Circuit correctly considered the facts and applied them in accordance with the law as set forth in *Buckley* and *Clanton*.

II. Adequate Remedies Exist for the Protection and Redress of Wrongly Prosecuted Defendants.

Petitioner argues that she was wrongly convicted of a crime and suffered damages as a result. This fact alone does not justify or support a claim under § 1983. *Thompson v. Prince William County*, 753 F.2d 363, 364-65 (4th Cir. 1985) cited with favor in *Schneider v. Simonini*, 314 N.J. Super. 583, 596 (App. Div. 1998). Indeed, while recognizing the salutary and necessary purposes served by prosecutorial immunity, our Supreme Court also recognized that the application of the immunity rule may "leave a genuinely wronged defendant without civil redress." *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984, 993, 47 L.Ed.2d 128 (1976). Indeed, every form of legal immunity – charitable immunity, tort claims immunity, etc. – arguably leaves a wronged defendant without civil redress. Such is the nature of immunity.

However, a cognizable cause of action does not lie behind every alleged injury. Petitioner's remedy lies in the criminal justice system, not in a civil rights suit. "Harm to a falsely-charged defendant is remedied by safeguards built into the judicial system – probable cause hearings, dismissal of the charges – and into the state codes of responsibility." *Giuffre v. Bissell*, 31 F.3d 1241, 1252 (3rd Cir. 1994).

Petitioner's conviction was reversed on appeal. *State v. Michaels*, 264 N.J. Super. 579 (App. Div. 1993). The New Jersey Supreme Court affirmed that decision. *State v. Michaels*, 136 N.J. 299 (1994). She has benefited from the remedies available to her. The law provides no other remedy. Nor should it.

Civil immunity has costs. It is for our Courts and Legislatures to balance the competing interests and determine when that cost is worth the price. Our Courts have recognized that prosecutorial immunity is a necessity without which law enforcement could not properly function. Immunity exists to protect those who have in good faith made a questionable choice by giving "ample room for mistaken judgments" while still allowing them to do their job. *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986). Given the public policy reasons upon which qualified immunity is founded, the immunity is – and must be – paramount over claims for civil redress.

CONCLUSION

For all of the foregoing reasons, Respondent Susan Esquilin, Ph.D. (improperly pleaded as "Susan Esquillan") respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

TERRI SMITH
Counsel of Record

STEVENS & MINTER
One Harmon Plaza, 7th Floor
Secaucus, New Jersey 07094
(201) 319-5700

Counsel for Respondent Susan Esquilin, Ph.D. (improperly pleaded as "Susan Esquillan")